No. 666

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE CHIPPEWA INDIANS OF MINNESOTA, APPELLANTS

v.

THE UNITED STATES

ON APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion and supplemental opinion of the Court of Claims (R. 56–76) are not yet reported.

JURISDICTION

The judgment from which this appeal is taken was entered November 14, 1938 (R. 33). On January 9, 1939, the court below denied motions for a new trial filed by both parties and allowed in part their requests for amendments to the special findings of fact (R. 76). This appeal was allowed on January 24, 1939 (R. 83). Probable jurisdiction was noted March 6, 1939. Appellants invoked the

jurisdiction of this Court under the special jurisdictional Act of June 22, 1936, c. 714, 49 Stat. 1826.

QUESTIONS PRESENTED

1. Whether the power of Congress to administer the tribal property of Indians in any way it deems to be in the interest of the Indians was terminated by the Act of January 14, 1889, c. 24, 25 Stat. 642, and agreements thereunder, as regards the trust fund established pursuant to Section 7 of that Act, so that thereafter Congress, in administering the fund, was restricted to a strict compliance with the provisions of Section 7.

2. Whether, assuming that the plenary power of Congress was so extinguished as to the fund established under Section 7, various disbursements which the United States has made from the fund violated that section, and whether, assuming that they did, the damages for such violations are presently ascertainable.

STATUTES INVOLVED

The full text of the Act of January 14, 1889, c. 24, 25 Stat. 642, and the pertinent provisions of the special jurisdictional Act of May 14, 1926, c. 300, 44 Stat. 555, as amended by the Acts approved April 11, 1928, c. 357, 45 Stat. 423, and June 18, 1934, c. 568, 48 Stat. 979, are set out in the special findings of the court below (R. 33–42).

STATEMENT

This suit was brought by the Chippewa Indians of Minnesota pursuant to a special jurisdictional act to compel the United States as trustee of a fund established by the Act of January 14, 1889, c. 24, 25 Stat. 642, to restore to the principal of the fund certain sums paid out of the fund by the United States for the benefit of the Indians.

The Court of Claims dismissed the petition (R. 79). It held that after the Act of 1889 the Chippewa Indians of Minnesota, who had theretofore comprised a number of bands of tribal Indians, became a single tribal organization having communal lands and funds (R. 59–60, 64); that the Act, and its approval by the Indians, did not vest property rights in individual Indians (R. 61) nor abrogate the plenary power of Congress over Indian tribal property (R. 72, 76); and that since the disbursements from the fund were authorized by the Act of 1889 or subsequent acts of Congress and were used for the benefit of the Indians without profit to the United States (R. 59, 71–72) the Indians were not entitled to recover. The Indians have appealed.

The Act of January 14, 1889, proposed to the Minnesota Chippewas a plan for ceding to the United States all their lands except those required and reserved to fill allotments. Agreements of cession were thereafter concluded with the various Chippewa bands, and were approved by the President on March 4, 1890 (R. 42, 43).

Section 7 of the Act provides: The money realized from the sale of the ceded lands, after deducting certain expenses, shall "be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund," and shall draw 5 per cent interest. For a period of 50 years after the allotments provided for in the Act have been made three-fourths of the interest shall be paid to the Indians annually, and the balance devoted to education, and upon the termination of the trust period the fund shall "be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares." Congress may from time to time during the trust period make appropriations not exceeding 5 per cent of the principal of the fund for purposes of civilization and self-support among the Indians. The United States undertakes to advance interest in the sum of $90,000 annually, less any interest accruing on the fund, until the fund shall equal or exceed $3,000,000, at which time the United States shall be reimbursed out of the excess for all advances of interest and other expenses under the Act.

The appellants contend that this section created a vested right in the principal of the fund in those Chippewas and their issue who would be alive at the time of distribution, and that every disbursement from principal not specifically authorized by Section 7 was a violation of the rights of these dis-

tributees Suing on behalf of these distributees, they ask that all such disbursements be restored to the principal of the fund. The particular acts of the United States, as trustee, upon which appellants base their claim to recover may be summarized as follows:

1. By Section 8 of the Act of 1889 and annually in each of the years 1891 to 1910, both inclusive, Congress appropriated $90,000 as advance interest. Expenditures from these appropriations totalled $1,869,929.39, of which $896,246.93 was reimbursed to the United States from the principal fund and the balance from the interest fund (Findings 7 and 8, R. 43–45). The appellants, asserting the maximum reimbursable out of principal to be the amount which would have been advanced had appropriations ceased when the fund commenced to earn $90,000 annually less such amounts as had then accrued as interest on the fund, claim that the reimbursement of $896,246.93 exceeds by $232,010.91 the amount authorized by the Act (Br. 78–81).

2. Between 1890 and 1910 Congress appropriated out of public funds a total of $2,350,559 for the relief and civilization of the Indians and directed that these expenditures be reimbursed out of the proceeds of sale of the ceded lands. It is not shown to what extent any of these appropriations exceeded 5% of the principal of the fund. Of the $2,338,625.32 expended under these appropriations

and subsequently reimbursed, $328,163.95 was manifestly authorized by the Act of 1889 and is not in dispute (Finding 9, 10, R. 45–47). Appellants claim that the expenditure of the balance of $2,010,461.37, and of additional sums totalling $107,445.71, disbursed for school buildings and for drainage surveys pursuant to appropriations by Congress and reimbursed from the principal fund (Findings 11, 12, and 14, R. 47–49),[1] was unauthorized by the Act (R. 31; Br. 81–88).

3. From 1911 to 1926, inclusive, Congress appropriated directly from the principal fund sums aggregating $2,754,500 for promoting civilization and self-support among the Indians. No one of these appropriations exceeded 5 per cent of the amount then constituting the fund. Pursuant to these appropriations, $2,526,267.74 was expended for the benefit of the Indians (Finding 15, R. 49, 50). Appellants claim that the Act of 1889 permits the appropriation, for civilization and self-support, of a maximum of 5 per cent of the total sum paid into the principal fund after admittedly authorized deductions had been made. They variously estimate this 5 per cent at $800,000 and $883,116.29, and assert that the excess disbursed for these purposes was in violation of the Act (Br. 89–93).

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[1] Assignment X (Br. 21) relates to these additional disbursements but the point is not argued.

4. Between June 30, 1904, and June 30, 1927, the sum of $547,421.25 was paid out of the principal fund without any specific appropriation by Congress, but under authority of the Act of 1889, to defray certain expenses, including expenses incurred in connection with councils and delegations, the allotment of reserved land, and the sale of ceded land and timber (Finding 16, R. 50, 51). These expenditures, and particularly such as relate to the care and sale of timber, are claimed to violate the Act (Br. 97–98).

5. In accordance with acts of Congress ratified by the Indians sums aggregating $5,684,341.50 were paid out of the principal fund in per capita cash payments from 1916 to 1927, inclusive. The individual recipients of these payments each released his interest *pro tanto* in the principal fund (Findings 21–23; R. 54–56). Appellants claim that the entire amount distributed should be restored to the fund (Br. 98–103).

6. Appellants further demand interest from the date of disbursement on each of the foregoing amounts (R. 30–32).[2]

The special jurisdictional act permits the United States to offset claims against the Indians or gratuities conferred on them. From January 14, 1889, to June 30, 1934, the United States expended for

[2] Claims numbered 10 and 11 in the prayer for relief of appellants' second amended petition (R. 30–32) were not pressed in the Court of Claims and have been abandoned. Claims numbered 2, 4, and 5 therein are not urged in appellants' brief and appear to have been dropped.

the use and benefit of the Indians a total of $5,065,878.95 for which it has received no reimbursement (Finding 20; R. 54).

SUMMARY OF ARGUMENT

The court below correctly dismissed the petition.

All payments out of appellants' fund were made pursuant to the Act of January 14, 1889, or subsequent acts of Congress, and since they were expended exclusively for the benefit of the Indians they were within the plenary power of Congress over the property of tribal Indians. Appellants' contention that the consent of the Chippewa bands was necessary to give legal validity to the Act of 1889 is unsound, but even if true such consent was required only to merge the properties of the bands into one tribal property in which the enrolled members of all bands would share equally. All other features of the plan contemplated by the Act, including the sale of lands to provide a fund could have been put into effect without the Indians' consent. Even if such consent was necessary as to one particular feature of the plan, that did not deprive Congress of plenary power thereafter to administer the other features of the plan, nor warrant the inference that Congress intended to enter into a contract with Indians depriving it of that power, if, indeed, Congress could barter it away. The Act of 1889 presents no exception to the rule that treaties

or agreements with the Indians, even though containing provisions which Congress was powerless to impose without the Indians' approval, are not to be construed as contracts vesting rights in individuals, but as public laws subject to such changes as Congress in the exercise of its plenary power may consider desirable. Neither the tribal status of the Indians or their property nor the power of Congress as guardian terminates until Congress expressly so directs. The Act of 1889 and subsequent acts of Congress affecting the Minnesota Chippewas plainly treat the funds as tribal.

Even if Congress were required to administer the trust fund strictly in accordance with the Act of 1889, there can be no recovery on the present record because (1) there is no proof that reimbursement for advance interest was not correctly allocated between the principal and interest funds, (2) it is not shown to what extent any of the appropriations from public funds for the relief and civilization of the Indians, exceed the 5 per cent of the fund which Congress was authorized to appropriate from time to time, (3) none of the appropriations from the Chippewa fund for civilization and self-support exceeded 5 per cent of the fund, and (4) any damage suffered because of per capita cash payments of principal by persons born since the making of those payments (who alone might have standing to complain) cannot be ascertained

on the present record or until the time for final distribution.

ARGUMENT

I

THE ACT OF 1889 DID NOT, AS REGARDS THE FUND ESTABLISHED PURSUANT TO SECTION 7 OF THAT ACT, TERMINATE THE PLENARY POWER OF CONGRESS TO ADMINISTER INDIAN TRIBAL PROPERTY. THE ACTS COMPLAINED OF WERE WITHIN THAT POWER

At the beginning of the nineteenth century the Chippewas were one of the larger Indian tribes in the Northern United States. First dealt with as a single tribe, they later came to be regarded as divided into bands, each entitled to hold its lands indepe ently of the others and of the Chippewas as a whole. *Chippewa Indians* v. *United States*, 301 U. S. 358, 360, 361. At the time the Act of 1889 was passed the Minnesota Chippewas, who were considered collectively as a single tribe, comprised numerous bands occupying distinct reservations. They were tribal Indians and held their reservations as tribal lands. *Wilbur* v. *United States, ex rel. Kadrie*, 281 U. S. 206, 208.

It is well established and appellants, of course, do not deny that Congress has full power in the administration of the tribal property of Indians to use such property for any purpose it deems to be for the good of the tribe. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187

U. S. 553; *Winton* v. *Amos,* 255 U. S. 373. The only limitation upon the power of Congress over the tribal property is that it cannot confiscate it or devote it to purposes admittedly not for the benefit of the tribe. *United States* v. *Mille Lac Chippewas,* 229 U. S. 498; *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110; *United States* v. *Creek Nation,* 295 U. S. 103.

Unless the Act of 1889 was intended to and did create individual rights in what had admittedly been tribal property, the appellants can in no event recover, for, as will be shown *infra,* pp. 28–34, each of the payments complained of was authorized by act of Congress and was made directly to or applied for the benefit of the Chippewa Indians of Minnesota without profit to the United States. *Thus the crucial question presented is: What, if any, change was wrought by the Act of 1889 and the agreements of cession upon the legal status of these Indians and their property?*

Appellants contend that when the act became effective on March 4, 1890, the tribal relation was abolished and two separate classes of individual Indians, composed respectively of income beneficiaries and remaindermen, resulted, each with vested interests in the trust fund, it being appellants' theory that the consent of each band was required to merge their properties into one fund in which all the Indians shared equally, and that Con-

gress to secure this consent, abandoned its sovereign power of guardianship and entered into a binding contract, which limited limiting its authority to that of an ordinary trustee of an express trust.

It is the position of the Government that all provisions of the Act of 1889, including those relating to the sale of the lands of the numerous bands to produce a fund for the equal benefit of all the Chippewa Indians in Minnesota, could have been imposed without the consent of the Indians; that, even if consent was necessary to effect a merger of the properties of the bands, its necessity solely for that purpose would not limit, as to other provisions of the Act, the plenary power of Congress over tribal Indians and their property; that the fact that Congress chose to obtain the consent of the Indians is no indication that a contract was made or that the plenary power was abandoned; that the Act of 1889 itself and subsequent acts of Congress show a consistent intention to treat the Chippewas in Minnesota as a tribe and their funds as tribal funds subject to being administered by Congress in the exercise of the plenary power; that the Act of 1889 was at most a declaration of present intention as to the management of the fund, subject to alteration at any time that changed conditions or the welfare of the Indians required it, so long as the tribal status continued or until rights vested in possession in individuals through the carrying of the Act into effect; and that charges made by the

appellants that the trust was improvidently administered are not supported by the facts.

A. THE ACT OF 1889 AND THE AGREEMENTS OF CESSION DID NOT CREATE VESTED RIGHTS TO HAVE THE FUND ADMINISTERED STRICTLY ACCORDING TO THE TERMS OF SECTION 7 OF THAT ACT

It is established that no treaty with the Indians or act of Congress regulating their affairs, whether or not submitted to them for their approval or consent, creates a contract or vests rights so as to disable Congress from later making such changes as conditions require, so long as tribal relations continue and no individual rights have attached by the carrying of the legislation into effect.[3] Appellants seek to distinguish the present case on the ground that the consent of the Indians to the provisions of the Act of 1889 not only was obtained but had to be obtained and that therefore the United States, in order to induce the Indians' approval cast off its sovereign powers and, on equal terms, entered into negotiations which resulted in a contract irrevocably binding on both the United States and the Indians.

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[3] *Chase, Jr.* v. *United States*, 256 U. S. 1, 7 (Treaty); *United States* v. *Chase*, 245 U. S. 89 (Treaty); *Sizemore* v. *Brady*, 235 U. S. 441, 449–450 (Original Creek Agreement); *Gritts* v. *Fisher*, 224 U. S. 640, 648 (Cherokee Agreement); *Choate* v. *Trapp*, 224 U. S. 665, 670–671 (Atoka Agreement); *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565 (Treaty); *Thomas* v. *Gay*, 169 U. S. 264, 271 (Treaty); *The Cherokee Tobacco*, 11 Wall. 616 (Treaty). See also *Ex parte Webb*, 225 U. S. 663, 683; *Cherokee Intermarriage Cases*, 203 U. S. 76, 93; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488;

While it is true that the opinion of this Court in *Chippewa Indians* v. *United States*, 301 U. S. 358, 375–377, intimates, although it does not hold, that Congress could not constitutionally pool the properties of the various bands without first securing the assent of each of them, it is suggested that there is a substantial distinction between appropriating the property of one band or tribe for the use of another [4] and merging the properties of several bands, particularly when, as here, each had formerly been part of the great Chippewa tribe and at the time of the merger were all regarded collectively as the single tribe of Minnesota Chippewas. *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206, 208. In the former situation no conceivable benefit can accrue to the band whose property is taken; in the latter the loss by one band of its exclusive

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Ward v. *Race Horse*, 163 U. S. 504, 511; *Spalding* v. *Chandler*, 160 U. S. 394, 406–407; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U. S. 114, 117.

Also see *Morrison* v. *Fall* (App. D. C. 1923), 290 Fed. 306, 309–311 (the Act of 1889 was not a contract and Congress in its discretion could change the method of handling Chippewa funds), aff'd on the ground the United States was a necessary party, *sub nom. Marrison* v. *Work*, 266 U. S. 481.

Regarding the power of Congress to administer the trust of Osage mineral rights see *Taylor* v. *Tayrien* (C. C. A. 10, 1931), 51 F. 2d 884, 887, 890, 891, cert. den. 284 U. S. 672; *Ne-Kah-Wah-She-Tun-Kah* v. *Fall* (App. D. C. 1923), 290 Fed. 303, dism. for want of jurisdiction 266 U. S. 595; *Globe Indemnity Co.* v. *Bruce* (C. C. A. 10, 1935), 81 F. 2d 143, 150, cert. den. 297 U. S. 716.

[4] *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, 113; *United States* v. *Creek Nation*, 295 U. S. 103, 109–110; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497.

right to the use and occupancy of its reservation is compensated by the joint interest its members receive in the property of all of the merged bands. Moreover, the administration of the combined properties as a single unit may well confer an additional general benefit. No reason is perceived for establishing a rule that the United States, by recognizing a band as an entity, should forever be barred from including that band and its property in administrative measures which it is empowered to adopt for the welfare of the tribe of which the band in question forms a part. It is submitted that the power to determine when to deal separately with a band and when to treat it as a part of the whole tribe is political and within the exclusive jurisdictio of Congress.[5]

But, even assuming the necessity of securing the bands' approval of the pooling of their properties,

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[5] We need not consider whether the properties of two or more separate tribes or of two or more bands not affiliated with the same tribe may be pooled without their consent, but where all bands concerned are related to the same tribe there is no reason why one should be deemed vested with a greater share of the tribal wealth than its proportionate population warrants. In this connection Commissioner Rice, after recalling to the Council of the Mille Lac Band that the Chippewas as a whole had driven out the Sioux from the lands they now occupied, said:

"Afterward you owned the country, and as you had taken it in common, it belonged to you in common. * * * The Great Council, in looking over your history for a great many years back, came to the conclusion that the holding of the land should remain as at first, and that you should reap the benefit of your united efforts." H. Ex. Doc. 247, 51st Cong., 1st Sess., pp. 164, 165.

it does not follow that the United States lost the power to deal with the combined tribal assets that it previously had with respect to the same assets of the several bands. No inference can be drawn that Congress intended to enter into a contract with the Indians depriving it of that power, if, indeed Congress could barter it away. At most consent was required to effect the merger, for all other provisions of the Act of 1889, including the conversion of lands into trust funds, could have been enacted through the exercise of the plenary power. *United States* v. *Rowell*, 243 U. S. 464, 468; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568. If power were lacking in Congress to administer Indian funds and such power were conferred by agreement, there might be some grounds for argument that the terms of the agreement with respect to administration would bind Congress. But such is not the case. The power to administer the property existed. If any power was conferred by agreement, it was merely to administer the property as one fund for the benefit of all the Indians rather than as a number of separate funds each for the exclusive benefit of the members of one band. It is not contended that it has not been so administered. It is absurd to suppose that Congress, in order to secure the pooling of interests of Indian bands—a change designed to promote more advantageous administration of their property and to carry out its then policy of ultimately breaking up the tribal relation—should have bartered away its power as

guardian to protect them from such vicissitudes as might occur in the critical period of their emergence from a state of tutelage. *Conley* v. *Ballinger*, 216 U. S. 84, 90, 91.[6]

Unless and until Congress unmistakably manifests an intention to emancipate tribal Indians and abandon its plenary power over them and their property, that power continues to exist.[7]

It is not material that treaties or agreements may have been entered into embodying provisions which Congress could not have imposed without the consent of the Indians. The case of *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, involved facts closely analogous to the present case. A treaty, 15 Stat. 581, concluded in 1867 with the Kiowa and Comanche tribes set apart a reservation for their use. By a separate treaty, 15 Stat. 589, concluded on the same day with these tribes and the Apache

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[6] A change in character of Indian property over which the United States has control, even though made by contract which only the Indians have power to execute, does not of itself extinguish the power of the United States. *Sunderland* v. *United States*, 266 U. S. 226, 233–234; *Mott* v. *United States*, 283 U. S. 747, 750. These cases deal with individual property, over which the federal power is more limited, but the principle is the same because the restrictions against alienation which are placed upon allotments are merely a retention by Congress of certain attributes of the plenar power which it formerly exercised over the tribal property. *Heckman* v. *United States*, 224 U. S. 413, 436–437.

[7] *Winton* v. *Amos*, 255 U. S. 373, 391–392; *Brader* v. *James*, 246 U. S. 88, 96–97; *United States* v. *Nice*, 241 U. S. 591; *United States* v. *Sandoval*, 231 U. S. 28; *Tiger* v. *Western Investment Co.*, 221 U. S. 286. Compare *United States* v. *Herron*, 20 Wall. U. S. 251, 263.

tribe, the Apache tribe became confederated with the two former-named and entitled to share their reservation. If appellants' contention is correct, Congress could not have compelled the merging of these tribes or conferred on the Apaches the right to equal participation in the property of the Kiowas and Comanches if the latter had not consented thereto. Article 12 of the first of these treaties provided that no treaty for the cession of any portion of the reservation should be valid unless executed by three-fourths of all the adult male Indians. In 1892, an agreement for the cession of part of the reservation, purporting to have the required assent, was concluded but it developed that a substantial question existed as to whether a sufficient number of Indians had in fact voted in favor of the agreement. Nevertheless Congress ratified the agreement by the Act of June 6, 1900, c. 813, 31 Stat. 676. Thereafter Lone Wolf brought suit to enjoin the Secretary of the Interior from carrying out the Act. This Court, referring to Article 12 of the treaty, said (page 564):

> The appellants base their right to relief on the proposition that by the effect of the article just quoted the confederated tribes of Kiowas, Comanches and Apaches were vested with an interest in the lands held in common within the reservation, which interest could not be divested by Congress in any other mode than that specified in the said twelfth article, and that as a result of the

> said stipulation the interest of the Indians in the common lands fell within the protection of the Fifth Amendment to the Constitution of the United States, and such interest—indirectly at least—came under the control of the judicial branch of the government. We are unable to yield our assent to this view.
>
> The contention in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained.[8]

Surely, agreements made after Congress had ceased making treaties with the Indians and adopted a policy to govern them by acts of Con-

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[8] See also *The Cherokee Tobacco*, 11 Wall. 616, 621, upholding the power of Congress to tax tobacco grown by Cherokees in the Indian Territory and there sold, in spite of a contrary provision in the treaty of July 19, 1866, 14 Stat. 799. This treaty also provided that freed persons who had been slaves of the Cherokees and freed negroes residing with the tribe should have all the rights of native Cherokees, including those in tribal lands and funds. Clearly, this provision could not have been imposed by Congress without the consent of the tribe.

gress[9] can have no greater sanctity than treaties. It is submitted, therefore, that appellants' case presents no exception to the rule that treaties with Indian tribes are not to be regarded as contracts but as public laws which can be abrogated at the will of Congress, *Choate* v. *Trapp*, 224 U. S. 665, 670–671; and that agreements have no greater effect than an act of Congress, *Gritts* v. *Fisher*, 224 U. S. 640, 648.

In *Sizemore* v. *Brady*, 235 U. S. 441, the Court was called upon to determine whether the heirs of a deceased member of the Creek tribe, entitled to enrollment under the Act of March 1, 1901, c. 676, 31 Stat. 861, called the Original Creek Agreement, were to be determined by the laws of the Creek Nation as provided in that act or by the laws of Arkansas as provided in the Act of May 27, 1902, c. 888, 32 Stat. 258, and the Act of June 30, 1902, c. 1323, 32 Stat. 500, called the Supplemental Creek Agreement. The member of the tribe through whom all the parties derived their claims had died after the enactment of the first act, but before he had received any part of the lands or funds distributable to him. In deciding in favor of the heirs under the law of Arkansas, the Court held (pp. 449, 450) that the Original Creek Agreement was not a grant *in praesenti*, since the lands and funds to which it related were tribal property and individ-

[9]Act of March 3, 1871, c. 120, 16 Stat. 566, R. S. Sec. 2079. See *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 305; *United States* v. *Kagama*, 118 U. S. 375, 382.

nal rights attached only as the act was carried into effect. Up to that time Congress retained full plenary power and, since it could have revoked the agreement and pursued any other course it considered better for the Indians, including confining the allotment and distribution to living members of the tribe, it necessarily could change the provision of the act relating to descent and distribution of the undistributed share of a deceased member even after the latter's death.

A similar question was passed upon by the Court in *Gritts* v. *Fisher,* 224 U. S. 640. There an act or agreement of 1902 had provided for allotting and distributing Cherokee lands and funds among the individual members of the tribe living on September 1, 1902, and an act of 1906 directed that Cherokee children born after September 1, 1902, and living on March 4, 1906, should participate in the allotment and distribution. The later act, by enlarging the number of participants, operated to reduce the distributive share to which each would be entitled, and because of this the validity of that act was questioned, the contention being that the prior act confined the allotment and distribution to the members living on September 1, 1902, and therefore invested them with an absolute right to receive all the lands and funds, and that this right could not be impaired by subsequent legislation. The Court rejected the contention, holding that, notwithstanding the purport of the act, no such rights were vested thereby as to disable Congress

from later admitting newly born members of the tribe to the allotment and distribution. The Court said (p. 648):

> The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Intermarriage cases*, 203 U. S. 76, 93. It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued.

B. IT HAS BEEN CONSISTENT POLICY OF CONGRESS TO TREAT THE MINNESOTA CHIPPEWAS AS TRIBAL INDIANS SUBJECT IN THEIR PERSONS AND PROPERTY TO ITS GUARDIANSHIP

Since the plenary power is political and Congress alone may determine when it shall be relinquished,[19] its intention, expressed in the Act of 1889 and in subsequent legislation, that the tribal status of the Indians' property continue is conclusive.

The Act itself clearly reveals this intention, its very title stating that its purpose is "for the relief and civilization of the Chippewa Indians." Obviously the Indians were not considered civilized or ready to be released from the supervision of a

[19] *United States v. Sandoval*, 231 U. S. 28; *United States v. Nice*, 241 U. S. 591. See also *Winton v. Amos*, 255 U. S. 373, 391, 392; *Brader v. James*, 246 U. S. 88, 96; *Tiger v. Western Investment Co.*, 221 U. S. 286.

guardian. The continuing need for supervision is also apparent from the provisions of Section 7 of the Act establishing a 50-year trust period and permitting Congress from time to time throughout this period to make appropriations from the trust fund "for the purpose of promoting civilization and self-support" among the Indians. The fact that Congress contemplated that half a century might elapse before the Indians were capable of administering their property refutes the contention that it intended to abandon its plenary power in 1889. The tribal character of the fund is further evidenced by the fact that Section 7 of the Act provides that the proceeds of sale of tribal lands be deposited to the credit of "all the Chippewa Indians in the State of Minnesota," and that one-fourth of the interest on the fund thus created be used for the communal purpose of establishing and maintaining free schools. *United States* v. *Nice*, 241 U. S. 591, 599. Finally, the imposition of restrictions against alienation on the allotments to be made under Section 3 of the Act shows the intent to continue the guardianship of the United States.[11]

Subsequent legislation affecting the Chippewas shows that Congress has consistently treated them and their property as tribal. Within six months

[11] *United States* v. *Nice*, *supra*; *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, 437; *La Roque* v. *United States*, 239 U. S. 62, 66; *Heckman* v. *United States*, 224 U. S. 413, 436; *United States* v. *Rickert*, 188 U. S. 432, 437, 438; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 316.

after proclamation of the Act of 1889 Congress in the Act of August 19, 1890, c. 807, 26 Stat. 357, providing funds reimbursable out of the Chippewa principal fund for such purposes as houses, mills, implements, stock, seeds, schools, etc., indicated that it considered it was dealing with tribal property over which the plenary power continued to exist, for no express provision of the Act of 1889 authorized disbursements from the fund for these purposes. Between 1890 and 1926 Congress appropriated either from the trust fund or from public funds reimbursable therefrom a total of $5,105,059 for the civilization and support of the Chippewas (Findings 9, 10, 15; R. 45–47, 49–50). During the years 1889 to 1934 Congress authorized the expenditure of public funds totaling $5,065,878.95 for the use and benefit of the Chippewas without any stipulation for reimbursement (Finding 20; R. 54). While the appropriation of these funds is not in itself conclusive as to the continued existence of the tribe and of the plenary power of Congress, the fact that they were intended to be and were expended largely for the general benefit of the Indians as a community indicates that Congress considered that they retained their entity as a tribe subject to its will as their guardian. Moreover, in many of the acts passed by Congress during this period the Indians and their property are specifically referred to as tribal.[12]

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[12] Acts of August 1, 1914, c. 222, 38 Stat. 592; May 18, 1916, c. 125, 39 Stat. 135; March 2, 1917, c. 146, 39 Stat. 979;

The decisions of the Court support the Government's contention that the tribal status of the Chippewas and the plenary power of Congress over their property continued after the Act of 1889. In *United States* v. *Minnesota*, 270 U. S. 181, 193–194, it was held that as late as 1923 the United States, by virtue of its *guardianship* of these Indians, had an interest sufficient to maintain a suit against the State of Minnesota for the cancellation of patents conveying ceded Indian lands. See also *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206, 221; *La Roque* v. *United States*, 239 U. S. 62, 66.

Appellants contend that because the Chippewa Indians in Minnesota had never been formally recognized as a tribe and possessed no tribal organization they held their property after the Act of 1889 became effective as a class of individuals (Br. 44–52). But the Act of 1889 and subsequent acts dealt with these Indians as a tribe and it is not material whether a tribal organization existed. Prior to 1889 it is beyond dispute that the Indians maintained a tribal relation to the bands of which they were members. It follows that they held their property as tribal Indians without having individually any enforceable right therein. The Act of 1889 terminated the Indian title of the various bands and ulti-

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May 25, 1918, c. 86, 40 Stat. 572; June 30, 1919, c. 4, 41 Stat. 1...; February 14, 1920, c. 75, 41 Stat. 419; November 19, 1921, c. 133, 42 Stat. 221; January 30, 1925, c. 114, 43 Stat. 798; February 19, 1926, c. 22, 44 Stat. 7; March 4, 1929, c. 705, 45 Stat. 1584.

mately changed the form of the investment from lands to money, but it did not change the basic nature of the tenure of the property which remained tribal or communal. Although the Act contemplated the breaking up of the tribal relation, the transition from a state of tutelage to full emancipation was intended to be "gradual rather than an immediate." *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206, 221. It could not reasonably be otherwise, for, although it was within the power of Congress to put the Indians immediately upon a legal basis of complete equality with other people, only education acquired over a period of time could give them the degree of knowledge and civilization necessary to enable them to manage their property and compete on a basis of reasonable equality with other citizens. During this period of change in their way of life the need for a guardian would be more than ever acute and it cannot be supposed that Congress intended to surrender the power to act in this capacity which it unquestionably possessed before 1889. The fallacy in appellants' argument is that they assume there can be no plenary power in the absence of an organized tribe whereas in fact this power is an attribute of sovereignty over a subject people in a state of tutelage (cf. *United States* v. *Kagama*, 118 U. S. 375, 383, *Mormon Church* v. *United States*, 136 U. S. 1, 57) which continues to exist until they have been fully emancipated from the control and protection of the United States. The dependency of the Indians,

not the presence or absence of tribal organization, gives rise to the plenary power. Once it has attached to property, it persists until surrendered by Congress, notwithstanding that every vestige of tribal organization may have long since disappeared. *Conley* v. *Ballinger*, 216 U. S. 84, 90; *Winton* v. *Amos*, 255 U. S. 373.

The appellants, however, apparently contend that, even though, as indicated by the *Kadrie* case, the interest beneficiaries remained tribal Indians, it was contemplated that prior to the end of the 50-year trust period the remaindermen would constitute a class of emancipated individuals composed of "said Chippewa Indians and their issue then living" (Br. 25–26, 50–51). This so-called class of remaindermen, it is asserted, has a vested interest in the principal of the fund which entitles it to recover for any unauthorized diminutions thereof (Br. 66). The error in this argument is that there are not two classes composed of (1) 50 year income beneficiaries and (2) remaindermen, but one class only composed of the Chippewa Indians of Minnesota. It does not appear that Congress intended that the same persons should be treated at one and the same time as tribal Indians having individually "no title or enforcible right in the tribal property," *Choate* v. *Trapp*, 224 U. S. 665, 671, and also as individual Indians free of the tribal relation having, as appellants insist, continued vested personal and individual interests in a fund to be distributed at a future date. No such distinction

between the nature of the interests of the income beneficiaries and of the principal beneficiaries is suggested by section 7 or by any other provision of the Act of 1889. It follows that no rights vested in individuals when the Act of 1889 became effective. Since that time Congress has consistently recognized the continued existence of the tribe and no "class of emancipated individuals" with vested rights has come into being. Consequently, the so-called remaindermen cannot recover from the Government because of any uses made of the fund that were within its plenary power.

C. ALL THE PAYMENTS ALLEGED TO BE IN VIOLATION OF THE ACT OF 1889 WERE AUTHORIZED BY ACTS OF CONGRESS AND WERE FOR THE BENEFIT OF THE INDIANS

1. *All of the payments were authorized by acts of Congress.*—Appellants contend that the sum of $547,421.25 was paid out of the principal fund without authority of any act of Congress (Br. 97–98). This sum forms part of $669,606.34, which the court below found was expended under authority of the Act of 1889 (Finding 16, F. 50–51). The items composing it are set out in Finding 19 (R. 53). By far the largest of these and the one appellants particularly object to is the sum of $531,484.43 listed as "expenses, care and sale of timber." It will be shown (*infra*, pp. 40–42) that this as well as the other expenditures complained of was reimbursable as "other expenses" in connection with carrying out the Act within the meaning of Section 7. But if any doubt existed, it would be dispelled

by the Act of June 27, 1902, c. 1157, 32 Stat. 400, 404, which amended the provisions of the Act of 1889 relating to the sale of timber and provided:

> All the expenses incurred in carrying out the provisions of this Act as to the examining and listing of said lands, and the selling, cutting, and scaling of said timber, shall be paid by the Secretary of the Interior out of the proceeds of the sale of said timber * * *.

Appellants also claim that of $2,350,559 appropriated out of public funds from 1890 to 1910, inclusive, "to enable the Secretary of the Interior to carry out an Act entitled 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota, and for other purposes,' approved January 14, 1889," $2,010,461.37 was expended for unauthorized purposes not connected with carrying out the Act and consequently reimbursement therefor was improper (Findings 9 and 10; R. 45–47; Br. 81–88). The uses to which this money was put are listed in the findings (R. 46, 47). Appellants assume that "carrying out" the Act was intended to refer only to the mechanical details of effecting its immediate purposes, such as defraying the expenses of surveys, removals, and making allotments. The very size and continuity of the appropriations negative any such narrow intent. The larger purpose of the Act, as its title plainly states, was the relief and civilization of the Indians, and all of these expenditures were de-

signed to carry out this purpose. Moreover, the Acts of Congress appropriating the funds demonstrate that appellants' contention is without foundation by providing that part of the money shall be used for such purposes as houses, saw mills, flour mills, implements, stock, seeds, fencing and breaking land, schools, etc.[13]

2. *All of the payments were for the benefit of the Indians.*—Appellants do not contend, except with respect to expenses of Indian agencies, education, and certain minor items (Br. 85–87, 93–96), that all disbursements made from either the principal or interest fund were not applied for the benefit of the Indians. The Court of Claims found that all these expenditures were for their use and benefit (Findings 9–17, 19; R. 45–54).

With respect to payments out of the Chippewa fund to cover the expenses of maintaining Indian agencies, which appellants claim should be borne by the Government (Br. 85–87, 93–96), the Court

[13] Acts of August 19, 1890, c. 807, 26 Stat. 357; July 13, 1892, c. 164, 27 Stat. 138; March 3, 1893, c. 209, 27 Stat. 632; August 15, 1894, c. 290, 28 Stat. 289–290; March 2, 1895, c. 188, 28 Stat. 880–881; June 10, 1896, c. 398, 29 Stat. 326; June 7, 1897, c. 3, 30 Stat. 67; July 1, 1898, c. 545, 30 Stat. 575, 576; March 1, 1899, c. 324, 30 Stat. 928; May 31, 1900, c. 598, 31 Stat. 226; March 3, 1901, c. 832, 31 Stat. 1063; May 27, 1902, c. 888, 32 Stat. 249; March 3, 1903, c. 994, 32 Stat. 986; April 21, 1904, c. 1402, 33 Stat. 193–194; March 19, 1905, c. 1479, 33 Stat. 1051; June 21, 1906, c. 3504, 34 Stat. 350; March 1, 1907, c. 2285, 34 Stat. 1033; April 30, 1908, c. 153, 35 Stat. 82; March 3, 1909, c. 263, 35 Stat. 794; April 4, 1910, c. 140, 36 Stat. 276.

of Appeals of the District of Columbia said: "The agencies exist for the benefit of the Indians, and it was proper that the government, their guardian, in the administration of the trust fund, should pay the expense of maintaining them." *Morrison* v. *Fall* (App. D. C. 1923) 290 Fed. 306, 311, aff'd *sub nom. Morrison* v. *Work,* 266 U. S. 481. See also *Blackfeet Nations* v. *United States,* 81 C. Cls. 101, 137–138. The general public pays in taxes for the services rendered to it. It is just that the Indians who are not taxed, should be charged for the local expense of administering their affairs.

Appellants assert that payments out of the fund to the Minnesota Public School System for tuition of Chippewa children and for purchasing school grounds and erecting school buildings were not for the benefit of the Indians because Article VIII of the Constitution of Minnesota made it mandatory that a system of schools be maintained in each township and statutes of that state provided that the schools should be free (Br. 95–96).[14] However, Minnesota statutes also provided that the establishment of a school district was discretionary with the board of county commissioners and that taxes for the support of the public schools in each dis-

[14] Payments out of principal directly for education are also objected to on the ground that free schooling should under the Act of 1889 be paid for out of interest. It seems sufficiently plain that education was beneficial and that, if interest was inadequate, principal could be used for this purpose.

trict could be levied and collected upon the property therein. (Sess. Laws, Minn., 1877, pp. 115–118, 121–125; Gen. Stats., Minn., 1913, secs. 2671–2675, 2915–2917; Minn. Gen. Stats. 1923, secs. 2742–2746, 3011–3013; Minn. Stats. 1927, secs. 2742–2746, 3011–3013.) It is reasonable to assume that a district accessible to Indians might be financially unable to maintain school facilities on a sufficient scale to take care of Indian pupils unless the Indians who were not subject to taxation were able to make some contribution to their support. Where the establishment of a school exclusively for the Indians would entail greater expense than helping to support a state school for both Indians and Whites, it is obvious that the latter method was for the benefit of the Indians.

Appellants object to expenditures for burial of Indians, annual celebrations at White Earth, payments to former chiefs of the Mille Lac Band and purchases of land for allotment to individual Indians on the ground that they have no connection with civilization and self-support (Br. 96). It may be assumed that only indigent Indians were buried at the expense of the tribe. The expenditure of public funds for this purpose is necessary in any civilized community. Payments for the annual celebration at White Earth were made under specific appropriations by Congress.[15] It is obvious, even

[15] See for example Acts of March 3, 1911, c. 210, 36 Stat. 1065; August 24, 1912, c. 388, 37 Stat. 525; May 25, 1918, c. 86, 40 Stat. 572; February 14, 1920, c. 75, 41 Stat. 419.

if the determination by Congress were not conclusive, that such meetings would tend to advance civilization among the Chippewas. The payment to the Mille Lac chiefs was authorized by the Act of February 9, 1925, c. 164, 43 Stat. 818, "for services rendered and money expended in connection with the preparation and prosecution of the said [*United States* v. *Mille Lac Chippewas,* 229 U. S. 498] case. Judicious resort to litigation would tend to promote self-support, and it is proper that the tribe, which received the benefit, should bear the expense. The purchase of land for individual allotment resulted from the refusal of certain Mille Lac Indians to remove to the White Earth Reservation. Section 3 of the Act of 1889 permitted any Indian to choose his allotment on his home reservation, but as a result of the judgment in the *Mille Lac case, supra,* no lands in the Mille Lac Reservation remained available for allotment. By the Act of August 1, 1914, c. 222, 38 Stat. 591, Congress authorized the use of not more than $40,000 for "the purchase of lands for homeless, nonremoval Mille Lac Indians, to whom allotments have not heretofore been made * * *." $40,017.31 was expended for this purpose. Certainly the making of allotments in conformity with the provisions of the Act tended to promote civilization and self-support. In any event appellants are not injured, for the full value of that part of the Mille Lac reservation which, but for its disposal, would have been avail-

able for allotment to these Indians, was paid into the principal fund.[16]

It is submitted, therefore, that all payments out of the Chippewa fund were for the benefit of the Indians and hence were within the scope of the plenary power of Congress and that, since the Act of 1889 did not exhaust this power and Congress never surrendered it, the Court of Claims correctly dismissed appellants' petition.

D. CHARGES OF IMPROVIDENT ADMINISTRATION OF THE FUND, EVEN IF MATERIAL, ARE WITHOUT BASIS IN FACT

Appellants contend (Br. 67–70) that, if the trust had been administered in accordance with the Act of 1889 and only such deductions from principal made as were therein specifically authorized, the

[16] Appellants in their assignments of error (No. X, R. 82) object to the holding of the court below that money appropriated for drainage surveys was reimbursable, but since the point is not argued it has presumably been abandoned. The Court of Claims found (R. 47) that the money so expended was applied for the benefit of the Indians and said in its opinion (R. 70–71):

"The extent of the funds to be realized from the sale of surplus land was dependent upon their classification. Swamp lands if susceptible to drainage would enhance in value, and what the Government did was for the express benefit of the tribe. To bring the swamp areas into a state of cultivation was in direct accord with the intent of the Act of 1889, which by express terms contemplated, if it did not express, an intent to bring the estate to the point of its greatest value."

In fact, the drainage surveys did result in the reclamation of land which the Attorney General directed should be sold and the proceeds credited to the Indians (29 Op. A. G. 455, 468).

principal of the fund would have reached $15,000,000 and earned $750,000 a year. Applying these figures to the period from 1912 to 1927, inclusive, appellants assert that the Indians would have received $12,000,000 in interest and maintained their fund intact, whereas, in fact they received only $11,000,000 of which $4,000,000 represented interest earned by the fund and the balance, payments out of principal. This argument might be persuasive if its premise were based on fact. On October 31, 1910—before any reimbursements had been taken (other than such sums as may have been deducted for surveys, allotments, etc., in accordance with Sec. 7 of the Act)—there was $6,901,163.68 in the fund (H. R. Doc. 1167, 61st Cong., 3rd Sess.; Cong. Doc. Series No. 6069). Since it took twenty years for the fund to reach this total, it is reasonable to assume that it did not more than double in value in less than a year thereafter. Appellants' $15,000,000 figure, reached by deducting disbursements conceded to be proper, includes all sums paid into the principal fund up to 1927 (Finding 13, R. 47–48), and does not represent, as appellants' argument implies, the total in 1912.[17]

There is thus no foundation for appellants' contention that the interest on the fund would have been ample for the Indians in any emergency and no proof that Congress did not act wisely and for

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[17] See Appendix showing accruals to the fund during this period. These figures are taken from the report of the Comptroller General referred to in the findings (R. 50).

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their benefit in authorizing the disbursements from principal.

But even if the administration of the fund had been improvident, it would afford no basis for relief in this action, for as this Court said in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 308:

> We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative bran[illegible] to determine, and is not one for the courts.

II

EVEN IF CONGRESS WAS REQUIRED TO ADMINISTER THE TRUST FUND STRICTLY IN ACCORDANCE WITH THE ACT OF 1889, THE APPELLANTS ARE NOT ENTITLED TO RECOVER

A. CERTAIN EXPENDITURES AND REIMBURSEMENTS COMPLAINED OF EITHER WERE AUTHORIZED BY THE ACT OF 1889 OR ARE NOT SHOWN BY THE RECORD TO BE UNAUTHORIZED BY THAT ACT

1. The charge of $896,246.93 to principal account as partial reimbursement of interest advanced under the Act (Finding 8; R. 45) is claimed to exceed the authorized charge against principal by

$232,010.91 (Br. 78–81).[18] Section 7 of the Act provides:

> The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made until such time as said permanent fund, *exclusive of the deductions hereinbefore provided for,* shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; * * * and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess for all the advances of interest made as herein contemplated and other expenses hereunder. [Italics supplied.]

In making its computations appellants have ignored the fact that the Act contemplated that the expenses of making the census, obtaining the cessions, making the removal and allotments, and completing the surveys and appraisals should be deducted from the proceeds of sale of the ceded lands before being deposited in the trust fund. At the end of the fiscal year 1907 the total amount expended out of public funds for purposes for which deductions were authorized from the proceeds of

[18] Appellants' specific claims are summarized in the Statement, *supra*, pp. 5–7.

sale of lands was at least $624,944.66,[19] but this amount was not reimbursed from the fund until 1911 (Finding 18; R. 52). It is apparent that, if deductions had consistently been taken as expenditures were made, the fund would have earned less interest in the early years and taken longer to reach the total of $3,000,000 and the Government would have had the right under the Act to reimbursement out of the principal fund in a larger amount than that shown by appellants' computation. In the absence of any findings of fact from which the correct amount can be ascertained, it is to be presumed that the Government officials performed their duties correctly in their apportionment of the reimbursement between the principal and interest funds.

2. Appropriations totalling $2,754,500, of which $2,526,267.74 was expended, were made from 1911 to 1926, inclusive, directly from the principal fund (Findings 15, 17, 19; R. 49–54). Appellants claim that the amount authorized to be expended out of principal for purposes of civilization and self-support was 5 per cent of the total sum paid into the principal fund after admittedly authorized deductions had been made. This appellants variously

[19] The further sum of $328,163.95 was expended for like purposes between 1891 and 1913 and reimbursed out of the principal fund on various dates from 1911 to 1913 (R. 46). The dates of the expenditures do not appear, but from their nature it is reasonable to assume that most of them were made before 1907.

compute at $800,000 and $883,116.29 and seek to recover the balance (Br. 89–93).

Section 7 of the Act contains the following proviso:

> *Provided,* That Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof.

Appellants' contention that this proviso limits appropriations for civilization and self-support to a total of $800,000 or $883,116.29 for the fifty-year period is untenable. In 1889 there were 8,304 Chippewa Indians.[20] Even disregarding the probable increase in population after 1889 the average amount available annually for each Indian would, under appellants' contention, have been about $2 or a total of $100 over the trust term. It is not conceivable that Congress believed that civilization and economic self-sufficiency could be so cheaply bought. Such a circumscribed fund bears no resemblance to that of which the Indians at White Earth were told (H. Ex. Doc. 247, 51st Cong., 1st Sess., p. 86). "In case of the failure of crops or any unforeseen misfortune here is a store-house of money to be drawn upon for your wants." Under appellants' construction, upon the disbursement of 5 per cent of the fund the doors of this storehouse

[20] H. Ex. Doc. 247, 51st Cong., 1st Sess., p. 9; *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206, 208.

swung shut not to reopen until the end of the 50-year term. In the meantime the very persons who with their issue would ultimately share its contents might suffer want and privation. Neither Congress nor the Indians could have contemplated such a result, and the wording of the statute is entirely consistent with the more reasonable interpretation that the 5 per cent limitation was on the amount of each appropriation. None of those complained of exceeded that amount (Finding 15; R. 49–50).

Appellants also seek to recover the sum of $2,010,461.37, expended out of public funds under appropriations for civilization and relief during the years 1890 to 1910 and reimbursed out of the trust fund as required by the various acts (Findings 9, 10; R. 45–47; Br. 81–88). These disbursements were for purposes similar to those referred to in the preceding paragraph. It is immaterial that they were made out of public funds and later reimbursed to the United States instead of directly out of the trust fund, since the lapse of time between expenditure and reimbursement worked directly to the advantage of the Indians receiving interest from the fund. Although it does not appear in the record, in the early years these appropriations exceeded 5 per cent of the trust fund, but to what extent cannot be ascertained from the record and is not known.

3. Appellants claim that $547,421.25 was paid out of the trust fund without authority of any Act of Congress (Br. 97). The court below found that

this sum was part of $669,606.34 expended from the fund under authority of the Act of 1889 itself (Findings 16, 19; R. 50–51, 53–54).

Appellants now contend that Section 7 of the Act sets out in detail the expenses which were properly chargeable against the fund. These included only expenses "of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals" and hence exclude expenses in connection with the care and sale of timber, which accounts for $531,484.43 of the $669,606.34 referred to above (Finding 19, R. 53).[21] This expenditure was necessary to carry out the Act and the care of the timber prior to sale was essential if its full value was to be realized for the Indians.

Appellants' theory that the Act required the United States to bear these expenses not only finds no support in the Act but is contrary to the express provision of Section 7 that when the fund exceeded $3,000,000 "the United States shall be fully reimbursed out of such excess for all the advances of interest made as herein contemplated and other expenses hereunder." Plainly these "other expenses" which are to be reimbursed from the fund are not the same as those specifically set forth in the Act which by its terms are to be deducted from

[21] Apparently appellants have abandoned any claim that the expenditure of the balance of the $547,421.25 was unauthorized (Br. 97–98).

the proceeds of ceded land before such proceeds are placed in the Treasury. As to the latter there could never be any occasion for reimbursement from the fund.

B. ANY DAMAGE WHICH MAY HAVE BEEN SUFFERED BY REASON OF PER CAPITA CASH PAYMENTS TO INDIVIDUAL INDIANS IS AT PRESENT PURELY CONJECTURAL

Appellants seek to recover the sum of $5,684,341.50 (Br. 98–103) on account of per capita cash payments made to the individuals constituting the Chippewa Indians of Minnesota between 1916 and 1927 pursuant to appropriations out of the trust fund by Acts of Congress [22] ratified by the Indians (Findings 21, 23; R. 54–56). It is obvious that the persons who received these payments and released *pro tanto* their interest in the principal of the trust (Finding 23) were at the time of the payments not only the income beneficiaries but also the ultimate distributees of the trust fund. Only death prior to the time of distribution could defeat this latter interest. Those then living, all of whom participated in the payments, ratified the acts, and signed acquittances, are in no position to complain either on account of payments made to them [23] or on ac-

[22] Acts of May 18, 1916, c. 125, 39 Stat. 135; November 19, 1921, c. 133, 42 Stat. 221; January 25, 1924, c. 2, 43 Stat. 1; January 30, 1925, c. 114, 43 Stat. 798; February 19, 1926, c. 22, 44 Stat. 7. These acts are set forth in an appendix to the opinion of the court below (R. 77–79).

[23] Appellants admit that the shares of those living on the date of distribution are chargeable with advances received (Br. 108–109). See Restatement, Trusts, Sec. 255.

count of payments simultaneously made to Indians who have since died. Thus the only persons who have any standing are those who have been born since the per capita distributions were made. The record does not reveal the number of such persons or, indeed, that any exist, but, even if it did, it could not show the number there will be on the date of distribution. At most the right of distributees of the fund born after the payments in question and living when the trust terminates is to receive their distributive shares unaffected by the per capita payments.[24] Any deficiency in the fund which might exist on the date of distribution would be chargeable to the trustee, if at all, only to the extent that payments in excess of those authorized were made to Indians who had then died or payments to Indians who then survive exceeded their full distributive shares. But it is manifestly impossible to ascertain at this time the number of those who did not receive payments who will then be alive, the number of those who received payments who will then be dead, or the amount that will then be held in trust. Since, on the date of distribution the fund may be adequate to pay in full all those who can conceivably have a right to complain, any damage they may have suffered is purely speculative.[24] Authorities cited by appellants (Br.

[24] The special jurisdictional act as amended provides that "the plaintiffs, the Chippewa Indians of Minnesota, shall be considered as including and representing all those entitled to share in the final distribution of the permanent fund." This, however, does not permit recovery by so-called remainder-

106, 107) to the effect that a trustee is obligated to restore to the trust fund all moneys wrongfully disposed of, although no injury to the remainder occurs until the trust terminates, can have little application when the trustee is the United States which will continue able to respond for any damage that might be suffered, when the trust fund is not a res but only an entry on the books of the Treasury, and when an unascertainable number of the remaindermen are present interest beneficiaries who have received the payments complained of.

C. INTEREST

In the second amended petition (R. 30–32) appellants ask for interest from the date of disbursement on each of the amounts for which recovery is sought. So far as the so-called remaindermen are concerned, any award of interest would constitute a windfall, since, even if all distributions and expenditures of principal were unauthorized, they would only be entitled to have the fund made whole. If, on the other hand, recovery of interest is sought for income beneficiaries, only those would be entitled to it who did not consent to disbursements unauthorized by the Act of 1889. Restatement, Trusts, Sec. 216. As has been shown, the record

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men of damages which cannot be liquidated or determined until some time in the future. The jurisdictional act "merely provides a forum for the adjudication of the claim according to applicable legal principles." *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500.

contains no facts on which the amount of such interest, if any, could be computed. Appellants, however, contend that Sec. 4 of the jurisdictional act (R. 34–35) requires that interest be added to the amount of any judgment (Br. 105). Plainly the jurisdictional act "confined" any judgment to the value of the property appropriated and interest, and by conferring this remedy did not create a right to interest not otherwise recoverable upon applicable legal principles. See *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, 500.

D. GRATUITIES

Sec. 1 of the jurisdictional act, as amended (R. 34), provides that "the plaintiffs, the Chippewa Indians of Minnesota, shall be considered as including and representing all those entitled to share in the final distribution of the permanent fund." Sec. 3 allows "gratuities, if any, paid to or expended for said Indians subsequent to January 14, 1889" to be pleaded as an offset.

The court below found that between January 14, 1889, and June 30, 1934, the United States expended $5,065,878.95 out of public funds for which no reimbursement has been made (Finding 20; R. 54). The extent to which these expenditures may be offset as gratuities was not decided by the Court of Claims and would be a matter for determination by it in the event of retrial.

CONCLUSION

All disbursements from the principal fund were authorized by Congress and were within its power of guardianship which was not exhausted by the Act of January 14, 1889, and the ensuing agreements with the Indians, nor subsequently abandoned. Even assuming that Congress was required to administer the Chippewa fund strictly in accordance with the Act, the record fails to show any violations of its terms except in the distribution of cash to individuals with the consent of each and of the tribe as a whole and as to this no damage can be shown at this time. It is therefore respectfully submitted that the judgment of the Court of Claims should be affirmed.

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MARCH 1939.

APPENDIX

CHIPPEWAS OF MINNESOTA FUND

Abstract of deposits made in the permanent or principal fund set up in the United States Treasury under Sec. 7, Act of January 14, 1889 (25 Stat. 642):

Deposits up to and including Dec. 31, 1911

Sales of land and timber		$8,394,891.90
(The balance in this fund on Oct. 31, 1910, was $6,901,163.68, H. R. Doc. No. 1167, 61st Cong., 3d Sess.; Cong. Doc. Series 6069.)		
1912. Sales of land and timber		662,435.14
1913. Sales of land and timber		1,021,285.78
1914. Sales of land and timber		813,669.47
1915. Sales of land and timber		535,292.56
1916. Judgment *Mille Lac* case (39 Stat. 823)	$610,354.24	
Sales of land and timber	534,379.00	
		1,144,733.24
1917. Sales of land and timber		365,648.25
1918. Sales of land and timber		273,342.04
1919. Sales of land and timber		360,325.90
1920. Sales of land and timber		182,065.29
1921. Sales of land and timber		97,767.77
1922. Sales of land and timber		97,001.70
1923. Minnesota Nat'l Forest Award (35 Stat. 268; *Chippewa Indians of Minnesota* case, decided Jan. 12, 1938, unreported; Record in No. 244, Oct. Term, 1938, Supreme Court)	$1,490,195.58	
Sales of land and timber	143,625.48	
		1,633,821.06

1924. Sales of land and timber		$173,412.13
1925. Sales of land and timber		30,132.87
1926. Appropriation in payment for lands entered under the Free Homestead Act (44 Stat. 173)	$1,787,751.36	
Sales of land and timber	42,737.59	
		1,830,488.95
1927 to May 31. Sales of land and timber		10,043.32
		17,626,357.37
Deposits, 1890–1927. Included with the above, eleven items of deposit from various sources were made during the years 1890–1927 aggregating		35,968.33
		17,662,325.70

EXPLANATION OF DEPOSITS

All of the foregoing amounts are shown by the General Accounting Office report, filed in the Court of Claims, Case No. H–155. For sales of land and timber, see Report pp. 173, 876–878.

The *Mille Lac* judgment was for $689.460.54, and interest $24,393.70, aggregating $713,854.24 (51 Ct. Cls. 400). The latter amount was first set up in a special account, out of which, during the fiscal year 1917, the sum of $103,500 was disbursed as attorneys' fees. Thereafter the balance, shown above, was transferred to the Chippewas of Minnesota Fund. Nothing was transferred to the Interest Fund. (See Rept. pp. 162, 163, 173, 178, 253, 849.)

The Free Homestead Appropriation, made in 1926, was to compensate the Indians for ceded lands entered under the act of May 17, 1900 (31 Stat. 179), $1,787,751.36, credited to the principal fund, and $303,917.67 for interest, credited to the interest fund.

The eleven deposit items, for which no dates are given, came from various sources. Some appear to be consolidations of sundry receipts during the en-

tire accounting period. Approximately $13,000 appear to have been from sales of land and timber, and approximately $23,000 from refunds, or payments in the nature of refunds, of moneys theretofore disbursed from the principal fund. These eleven items are set out in Statement No. 15, page 173, General Accounting Office report.

The total of $17,662,325.70, in the foregoing table, agrees with the General Accounting Office Report (p. 173), and with Finding 13 of the Court of Claims.

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SUPREME COURT OF THE UNITED STATES.

No. 666.—October Term, 1938.

Chippewa Indians of Minnesota, Appellants, *vs.* The United States.	Appeal from Court of Claims.

[April 17, 1939.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims[1] dismissing a suit brought to compel restoration of trust funds alleged to have been diverted by the appellee.

In 1926 Congress granted permission for the bringing of the suit,[2] which was instituted April 13, 1927. In order to permit the claim to be presented in its present form the permissive act was amended in 1934.[3] The appellants then filed an amended petition to which the appellee responded by a general traverse. The right of appeal from the judgment of the Court of Claims is conferred by Joint Resolution of June 22, 1936.[4]

The suit is for the enforcement of equitable claims arising under or growing out of the Act of January 14, 1889.[5] The appellants' theory it that the Act constituted an offer on the part of Congress for an agreement with the bands of Chippewas located in Minnesota, whereby, if these bands would cede the Indian title to their reservations, (which they did), the United States would sell the timber thereon and open the agricultural lands to settlement, and hold the proceeds of the timber and the lands, in trust, to expend the income for purposes specified in the statute, including payment of a portion of such income to the Indians, and to distribute the

[1] — Court of Claims —.

[2] Act of May 14, 1926, c. 300; 44 Stat. 555, as amended by Acts of April 11, 1928, c. 357, 45 Stat. 423, and June 18, 1934, c. 568, 48 Stat. 979.

[3] Act of June 18, 1934, c. 568, 48 Stat. 979.

[4] c. 714, 49 Stat. 1826.

[5] 25 Stat. 642.

principal at the expiration of fifty years after allotments had been completed to all the members of the various bands on specified reservations. The circumstances leading to the adoption of the Act and its relevant sections appear in earlier decisions of this Court and need not here be repeated.[6]

The appellants assert that, by the Act of 1889, Congress abdicated its plenary power of administration of the Chippewas' property as tribal property, recognized that the reservations of the respective bands were not tribal property, and agreed to hold the proceeds of the ceded lands in strict and conventional trust for classes of individual Indians in accordance with the program outlined in the Act.

In this view the living Chippewas are beneficiaries of the income of the fund during the fifty year period, and individual Chippewa Indians who may be living at the expiration of the period, as a class, are remaindermen. It is urged that, as Congress has, from time to time, reimbursed the Treasury for expenditures for the benefit of the Chippewa Indians of Minnesota out of the fund, and has authorized other direct expenditures from the fund for the benefit of the Indians in ways not authorized by the Act, the United States has been guilty of a diversion of trust funds and that the appellants, as the representatives of the remaindermen, are entitled, on plain principles of equity, to demand restoration of the diverted sums to the corpus.

If, as the Court of Claims has found, the Act of 1889, and the cessions made pursuant to it, did not create a technical trust, we are relieved from considering many of the contentions pressed by the appellants in that court and here. We are of opinion that the Court of Claims was right in its decision that no such trust was created.

The original tribal status of the Chippewas is described in *Wilbur* v. *United States*, 281 U. S. 206, 208, and *Chippewa Indians* v. *United States*, 301 U. S. 358, 360. It is unnecessary now to restate what was there said on the subject.

It is true that, prior to the adoption of the Act of 1889, the tribe had been broken up into numerous bands, some of which held Indian title to tracts in the State of Minnesota. The Act refers to these collectively as "The Chippewas in the State of Minnesota." Whether or not the tribal relation had been dissolved prior to its

[6] Wilbur v. United States, 281 U. S. 206, 209, 210; Chippewa Indians v. United States, 301 U. S. 358, 362.

adoption, the Act contemplates future dealings with the Indians upon a tribal basis. It exhibits a purpose gradually to emancipate the Indians and to bring about a status comparable to that of citizens of the United States. But it is plain that, in the interim, Congress did not intend to surrender its guardianship over the Indians or treat them otherwise than as tribal Indians.

This is evidenced by a series of acts, the first of which was adopted nineteen months after the Act of 1889, which are inconsistent with the view that the Congress considered the Indians as emancipated or intended to enter into a binding contract with them as individuals.[7] Many of these statutes refer to the Chippewas of Minnesota as a tribe.[8] Moreover, an examination of the Act of 1889 discloses that it is not cast in the form of an agreement; and, we may not assume that Congress abandoned its guardianship of the tribe or the bands and entered into a formal trust agreement with the Indians, in the absence of a clear expression of that intent.

It is not contended that the expenditures made from the fund, or reimbursed from it, were not for the benefit of the Indians or were not such as properly might be made for their education and civilization, the purposes stated in the Act of 1889.

We hold that the Act did not tie the hands of Congress so that it could not depart from the plan envisaged therein, in the use of the tribal property for the benefit of its Indian wards.

The judgment of the Court of Claims is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[7] Aug. 19, 1890, c. 807, 26 Stat. 336, 357. Between 1890 and 1926 Congress appropriated, either from the fund created under the Act of 1889 or from public funds reimbursable therefrom, a total of $5,105,059 for the civilization and support of the Chippewas. (Findings 9, 10, 15.) During the period 1889 to 1934 Congress authorized the expenditure of public funds totaling $5,065,878 for the use and benefit of the Chippewas without any provision for reimbursement. (Finding 20.)

[8] Aug. 1, 1914, c. 222, 38 Stat. 582, 592; May 18, 1916, c. 125, 39 Stat. 134, 135; March 2, 1917, c. 143, 39 Stat. 969, 979; May 25, 1918, c. 86, 40 Stat. 561, 572; June 30, 1919, c. 4, 41 Stat. 3, 14; February 14, 1920, c. 75, 41 Stat. 408, 419; November 19, 1921, c. 133, 42 Stat. 221; January 30, 1925, c. 114, 43 Stat. 798; February 19, 1926, c. 22, 44 Stat. 7; March 4, 1929, c. 705, 45 Stat. 1562, 1584.

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